Filed 6/7/17 P. v. Mills CA3

NOT TO BE PUBLISHED



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JOSHUA DANIEL MILLS,<br><br>Defendant and Appellant. | C082095<br><br>(Super. Ct. No. 62084322) |

Defendant Joshua Daniel Mills appeals from the trial court's order denying his petition for resentencing pursuant to Penal Code section 1170.126[1] on the ground that resentencing him posed an unreasonable danger to public safety. He contends the trial court applied an incorrect definition of the term "unreasonable risk of danger to public safety," he had a constitutional right to a jury trial and the proof beyond a reasonable

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[1] Undesignated statutory references are to the Penal Code.

doubt standard on the dangerousness determination, and, in the alternative, he had a right to a clear and convincing standard of proof on the dangerousness determination. We shall affirm.

BACKGROUND

On September 24, 2008, defendant, who was serving a 20-year 4-month term[2] at Pelican Bay State Prison, was in Placer County Juvenile Court for a dependency proceeding, when he spat in the eye of a bailiff who was trying to remove him from the courtroom for yelling obscenities at the judicial officer and all other participants. A jury convicted him of felony counts of gassing a peace officer (§ 4501.1, subd. (a)), resisting an officer (§ 69), and two misdemeanor counts of obstructing or delaying a peace officer (§ 148, subd. (a)). The trial court sustained two strike allegations and sentenced defendant to 25 years to life.

Defendant, with the assistance of counsel, subsequently filed a petition for resentencing pursuant to section 1170.126. The trial court found defendant was eligible for resentencing, but denied the petition on the ground that resentencing him posed an unreasonable risk of danger to public safety. In support of its decision, the trial court noted defendant's extensive criminal record and his disciplinary record while incarcerated. Disputing some of the trial court's findings, defendant filed a request for rehearing, which the trial court denied.

DISCUSSION

I

The voters have recently passed two significant criminal reform measures, Proposition 36 in 2012, which modifies the three strikes law by requiring the third strike

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[2] Defendant's sentence was modified to a 16-year 4-month term in 2012.

to be a serious or violent felony (see *People v. Yearwood* (2013) 213 Cal.App.4th 161, 167-168), and Proposition 47 in 2014, which reduced a number of felony or wobbler offenses to misdemeanors (see *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091).

Both measures contain procedures for resentencing, under guidelines designed to preclude relief for offenders deemed to present "an unreasonable risk of danger to public safety." (§§ 1170.126, subd. (f); 1170.18, subd. (b).) Proposition 36 did not define this key phrase, although it set forth the types of evidence the trial court could consider in applying the initiative, which gave trial courts broad discretion to determine what conduct an offender was likely to engage in that might threaten public safety. (§ 1170.126, subd. (g).) While Proposition 47 continued to allow the use of the exact same evidence a trial court could consider (§ 1170.18, subd. (b)), it also defined this phrase to specify that the public safety risk must be risk that the petitioner will commit a so-called "super-strike" (§ 1170.18, subd. (c); see § 667, subd. (e)(2)(C)(iv)). Proposition 47 provided that its definition of risk to public safety would apply "throughout this Code." (§ 1170.18, subd. (c).) Such language refers to the Penal Code as a whole. (See *Marshall v. Pasadena Unified School Dist.* (2004) 119 Cal.App.4th 1241, 1255; *People v. Bucchierre* (1943) 57 Cal.App.2d 153, 166.)

Defendant contends that the trial court violated his due process rights by applying the section 1170.126 standard for determining danger to public safety rather than the narrower one set forth in section 1170.18, subdivision (c).[3] We disagree.

The goal of statutory construction "is to ascertain the Legislature's intent so as to effectuate the purpose of the law." (*People v. Lopez* (2003) 31 Cal.4th 1051, 1056.) We

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[3] This issue is currently before the California Supreme Court. (See, e.g., *People v. Myers* (2016) 245 Cal.App.4th 794, review granted May 25, 2016, S233937; *People v. Valencia* (2014) 232 Cal.App.4th 514, review granted Feb. 18, 2015, S223825.)

look first " 'at the plain and commonsense meaning of the statute because it is generally the most reliable indicator of legislative intent and purpose.' [Citation.]" (*People v. Skiles* (2011) 51 Cal.4th 1178, 1185.) If the statutory language is clear and unambiguous, the plain meaning governs, " 'and we need not resort to legislative history to determine the statute's true meaning.' [Citation.]" (*Ibid*.) "[W]e do not construe statutes in isolation, but rather read every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.' [Citation.]" (*People v. Pieters* (1991) 52 Cal.3d 894, 899.)

"We recognize the basic principle of statutory and constitutional construction which mandates that courts, in construing a measure, not undertake to rewrite its unambiguous language. [Citation.] That rule is not applied, however, when it appears clear that a word has been erroneously used, and a judicial correction will best carry out the intent of the adopting body. [Citation.]" (*People v. Skinner* (1985) 39 Cal.3d 765, 775.) In some cases the text and purpose of a measure reveal a drafting error that must be corrected. (*Id*. at pp. 775-776.)

Mindful of the trepidation judges feel when departing from the plain meaning of an enactment (see *Unzueta v. Ocean View School Dist.* (1992) 6 Cal.App.4th 1689, 1698-1699), we are compelled to conclude Proposition 47 contains a drafter's error. The phrase "throughout this Code" must be read to mean "throughout this act" to avoid illogical and unintended consequences. (See *In re Thierry S*. (1977) 19 Cal.3d 727, 741, fn. 13 [mistaken statutory cross-reference disregarded to avoid "obvious absurdity"].)

We begin by noting that Proposition 47 makes no direct reference to modifying any part of Proposition 36. A primary goal of Proposition 47 was to reduce the cost of housing petty criminals. (See Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 2, p. 70; *Harris v. Superior Court* (2016) 1 Cal.5th 984, 992.) Nowhere in the ballot materials were voters informed the law would also modify the resentencing provisions of Proposition 36, which concerns recidivist inmates serving sentences for

felony offenses that remain classified as felonies. The official title and summary, legal analysis, and arguments for and against Proposition 47 are all silent on what effect--if any--Proposition 47 might or would have on Proposition 36. (See Voter Information Guide, at pp. 34-39.)

More importantly, the structure and content of section 1170.18 is inconsistent with the intent to apply the narrow definition of risk throughout the entire Penal Code. Section 1170.18, subdivision (n) provides: "Nothing in this and related sections is intended to diminish or abrogate the finality of judgments in any case not falling within the purview of this act." Applying the newly narrowed definition of risk contained in section 1170.18, subdivision (c), would necessarily diminish or abrogate the finality of judgments in cases subject to Proposition 36, that do not fall within the purview of Proposition 47. For example, defendant's Proposition 36 petition seeks to undo his three strikes sentence while his conviction for selling methamphetamine is not a crime subject to Proposition 47 resentencing. (See § 1170.18, subd. (a).) Also, the wording of section 1170.18, subdivision (c) is inconsistent with an intent to apply it throughout the entire Penal Code. It refers to "petitioner[s]" which, throughout Proposition 47, is a term referring to persons petitioning under that act. (See § 1170.18, subds. (a), (b), (c), (j), (*l*), & (m).) The narrow definition of risk defines a phrase that appears in only two sections of the Penal Code, sections 1170.18 (Proposition 47) and 1170.126 (Proposition 36). If the voters had intended to apply the newer Proposition 47 definition to all Proposition 36 petitions, it is difficult to imagine a more roundabout and illogical means of doing so.

Other factors support our conclusion.

Propositions 36 and 47 have generally different purposes. In contrast to Proposition 47's general purpose of reducing the cost of imprisoning petty criminals, Proposition 36's primary goal was to "[r]estore the Three Strikes law to the public's original understanding by requiring life sentences only when a defendant's current conviction is for a violent or serious crime" and to "[m]aintain that repeat offenders

convicted of non-violent, non-serious crimes like shoplifting and simple drug possession will receive twice the normal sentence instead of a life sentence." (Voter Information Guide, Gen. Elec. (Nov. 6, 2012) text of Prop. 36, § 1, p. 105.)

The two initiatives also have generally different scopes. Proposition 36 benefits some defendants convicted of felonies with two or more strikes (serious felony convictions), whereas Proposition 47, generally speaking, benefits some persons who have committed petty felonies or wobblers that are to be reduced to misdemeanors, although some defendants may qualify for relief under both provisions. Because the would-be misdemeanants who stand to benefit from Proposition 47, as a class, are less dangerous than recidivist felons with prior strike offenses, it is logical to impose a higher dangerousness standard for them (§ 1170.18, subd. (c)) than the standard applied for recidivist felons under Proposition 36.

Finally, the timing of the two initiatives makes it unlikely that the Proposition 47 standard of dangerousness was intended to apply to Proposition 36 cases. Proposition 36 was enacted on November 6, 2012 (*People v. Etheridge* (2015) 241 Cal.App.4th 800, 804) and third strike prisoners had two years from the effective date of Proposition 36 to seek resentencing absent a "showing of good cause" (§ 1170.126, subd. (b)). Proposition 47 was enacted on November 4, 2014, just before the expiration of the time to file Proposition 36 petitions. (*People v. Morales* (2016) 63 Cal.4th 399, 404.) It seems unlikely that any rational voter would have intended to change the rules for Proposition 36 petitions at the last moment, when nearly all petitions would already have been filed and most of them had already been adjudicated.

Given consideration of the above points taken together, we conclude Proposition 47 contains a drafter's error, and the phrase "throughout this Code" must be read to mean "throughout this act." We do not reach this conclusion lightly, but in this particular situation, it is evident that the portion of the act at issue did not mean what it said. Accordingly, the trial court did not err by using the broader definition to determine

whether defendant posed an unreasonable risk to public safety, and was not required to find he posed a risk of committing a "super strike" if he were to be resentenced.

II

Defendant contends the Sixth and Fourteenth Amendments to the federal Constitution requires the fact of unreasonable dangerousness be proven to a jury beyond a reasonable doubt. This contention is premised on the argument that because defendant satisfies the eligibility requirements for resentencing under Proposition 36, the presumptive maximum sentence is effectively reduced to a second strike term. He is mistaken.

In *People v. Superior Court* (*Kaulick*) (2013) 215 Cal.App.4th 1279, the Second Appellate District rejected an identical argument and held the dangerousness determination does not implicate a defendant's Sixth Amendment rights. (*Kaulick*, at p. 1305.) After discussing the relevant decisions from the United States Supreme Court, which preclude a trial court from imposing a sentence above the statutory maximum based on a fact, other than a prior conviction, not found true by a jury beyond a reasonable doubt (see *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, [147 L.Ed.2d 435, 455]; *Blakely v. Washington* (2004) 542 U.S. 296, 303, [159 L.Ed.2d 403, 413]; *Cunningham v. California* (2007) 549 U.S. 270, 274-275, [166 L.Ed.2d 856, 864]), the court rejected the defendant's argument that "once the trial court concluded that he was eligible for resentencing under the Act, he was subject *only* to a second strike sentence, *unless* the prosecution established dangerousness." (*Kaulick*, at p. 1302.) The court explained that "section 1170.126, subdivision (f) does not state that a petitioner eligible for resentencing has his [or her] sentence immediately recalled and is resentenced to either a second strike term (if not dangerous) or a third strike indeterminate term (if dangerousness is established). Instead, the statute provides that he [or she] 'shall be resentenced' to a second strike sentence 'unless the court . . . determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.'

In other words, dangerousness is not a factor which enhances the sentence imposed when a defendant is resentenced under the Act; instead, dangerousness is a hurdle which must be crossed in order for a defendant to be resentenced at all. If the court finds that resentencing a prisoner would pose an unreasonable risk of danger, the court does not resentence the prisoner, and the petitioner simply finishes out the term to which he or she was originally sentenced." (*Id.* at pp. 1302-1303, fn. omitted.)

The *Kaulick* court continued: "The maximum sentence to which [the defendant], and those similarly situated to him, is subject was, and shall always be, the indeterminate life term to which he was originally sentenced. While Proposition 36 presents him with an opportunity to be resentenced to a lesser term, unless certain facts are established, he is nonetheless still subject to the third strike sentence based on the facts established at the time he was originally sentenced. As such, a court's discretionary decision to decline to modify the sentence in his favor can be based on any otherwise appropriate factor (i.e., dangerousness), and such factor need not be established by proof beyond a reasonable doubt to a jury." (*Kaulick, supra,* 215 Cal.App.4th at p. 1303.) Accordingly, like the situation in *Dillon v. United States* (2010) 560 U.S. 817 [177 L.Ed.2d 271] (*Dillon*), where the Supreme Court held sentence-reduction proceedings authorized by title 18 of the United States Code, section 3582(c)(2), "do not implicate the Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt" (*Dillon,* at p. 828 [177 L.Ed.2d at p. 285]), section 1170.126 "provides for a proceeding where the original sentence may be modified downward. Any facts found at such a proceeding, . . . do not implicate Sixth Amendment issues." (*Kaulick,* at pp. 1304-1305.)

We agree with the foregoing analysis and reject defendant's argument that the *Kaulick* court's reliance on *Dillon* was misplaced. Nor are we persuaded by his reliance on *Alleyne v. United States* (2013) ___ U.S. ___, [186 L.Ed.2d 314]. There, the United States Supreme Court held any fact that increases the mandatory minimum sentence for a crime must be submitted to the jury and proven beyond a reasonable doubt. (*Alleyne*, at

p. __ [186 L.Ed.2d at p. 321].) A finding that resentencing would pose an unreasonable risk of danger to public safety does not increase the mandatory minimum sentence for a defendant's crime. Like the situation in *Dillon*, it merely precludes a downward modification of the already-imposed third strike sentence. Defendant is therefore not entitled to the beyond a reasonable doubt standard or a jury trial on the dangerousness issue.

III

Defendant's final contention is that if the beyond a reasonable doubt standard is inapplicable to the future dangerousness issue, then the clear and convincing standard of proof should apply to that question. He claims that when "a sentencing enhancement is 'a tail which wags the dog of the substantive offense,' the usual sentencing standard of preponderance of the evidence may be inadequate to protect the defendant's due process rights." Claiming the dangerousness determination has an extremely disproportionate impact on his final sentence, the difference between 25 years to life and double the aggravated term, defendant concludes that the clear and convincing standard of proof should apply to the dangerousness determination.

Evidence Code section 115 states in pertinent part: "Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." This refers to statutory, constitutional, and decisional law. (Evid. Code, § 160.) Therefore, the preponderance standard is the default standard unless otherwise required by constitutional, statutory, or decisional law. (*Baxter Healthcare Corp. v. Denton* (2004) 120 Cal.App.4th 333, 368.)

Defendant's argument is based on Ninth Circuit Court of Appeals's precedent holding that "when a sentencing factor has an extremely disproportionate impact on the sentence relative to the offense of conviction, due process requires that the government prove the facts underlying the enhancement by clear and convincing evidence. [Citation.]" (*United States v. Jordan* (9th Cir. 2001) 256 F.3d 922, 930; see also *United*

*States v. Pineda-Doval* (9th Cir. 2010) 614 F.3d 1019, 1041.) Aside from being nonbinding authority, these cases are inapposite since they deal with proving a factor that enhances a sentence. Again, in the context of section 1170.126, a finding that resentencing a defendant to a second strike term would pose an unreasonable risk of danger to public safety does not enhance that defendant's sentence because he or she is already subject to the third strike term. Instead, assuming eligibility, a finding that resentencing would not pose such a risk, leads to a lowering of the third strike term to a second strike term.

We therefore agree with the *Kaulick* court that preponderance of the evidence is the proper standard of proof. As explained in *Kaulick*: "the proper standard of proof is preponderance of the evidence," explaining: "Evidence Code section 115 provides that, '[e]xcept as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.' There is no statute or case authority providing for a greater burden, and [the defendant] has not persuaded us that any greater burden is necessary. In contrast, it is the general rule in California that once a defendant is eligible for an increased penalty, the trial court, in exercising its discretion to impose that penalty, may rely on factors established by a preponderance of the evidence. [Citation.] As dangerousness is such a factor, preponderance of the evidence is the appropriate standard." (*Kaulick*, *supra*, 215 Cal.App.4th at p. 1305, fns. omitted.) The trial court did not err in applying the preponderance standard.

DISPOSITION

The judgment (order) is affirmed.

/s/
Blease, Acting P. J.

We concur:

/s/
Nicholson, J.

/s/
Hull, J.